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No. 84-

In The

Supreme Court of the United States

OCTOBER TERM, 1984

Robert A. Heghmann and
Beatrice M. Heghmann,
Petitioners,

v.

Connecticut Savings Bank,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT AND THE SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF FAIRFIELD

Robert A. Heghmann
203 Godfrey Road
Weston, CT 06883
(203) 356-4200
Attorney for Petitioners

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Questions Presented

The questions presented by the rulings below are:

I.

Did the Failure and Refusal of the State Superior Court Judge to rule on the constitutional issues, which were squarely presented to him, present an abuse of judicial discretion of such magnitude as to amount to a denial of the most fundamental element of the due process clause of the Fourteenth Amendment — the right to a full and fair hearing — and to a denial of the equal protection of the law.

II.

Did the Failure of the State Superior Court Judge to afford these particular defendants the benefit of established procedures under state law render the state proceedings so fundamentally unfair and so fundamentally deficient that they are inconsistant with the rudimentary demands of fair procedure resulting in a denial of due process.

III.

Did the State Supreme Court avoid deciding federal questions by putting forward non federal grounds of decision which are without any fair or substantial support.

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III.

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT AND THE SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF FAIRFIELD

Petitioners Robert A. and Beatrice M. Heghmann pray that writs of certiorari issue to review the judgments of the Supreme Court of the State of Connecticut and the Superior Court for the Judicial District of Fairfield in the above–entitled case.

Opinions Below

The opinion of the Supreme Court of the State of Connecticut is officially reported at 193 Conn. 157 (1984) and is set forth in Appendix D. The Supreme Court's earlier decision on the Motion

to Dismiss the Appeal which is not officiallly reported is set forth in Appendix C. The Superior Court's decisions on the Motion to Strike and Motion to Rectify the Record which are not officially reported are set forth in Appendices A and E, respectively. The opinion of the U.S. District Court (D. Conn.) denying Petitioners Motion for Preliminary Injunction which is not officially reported is set forth in Appendix B. The opinion of the Superior Court entering Final Judgment after Re-opening Judgment is not officially reported and is set out at Appendix F.

Jurisdiction

The judgment of the Supreme Court of the State of Connecticut was entered on May 15, 1984. This petition for writs of certiorari was filed within ninety (90) days thereof. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257 (3) (1976). On appeal the Supreme Court declined to hear argument on the appeal of the Superior Court's severance of the counterclaims. To the extent that review was declined by the Supreme Court, Petitioners pray that a writ also issue to the Superior Court to review that judgment.

Preliminary Statement

Where a man is sued, there may he defend. No citizen of the United States, be he rich man, poor man, beggar man or thief, shall be deprived of his life, liberty or property without the due process of law. This is the privilege that We, the People give to ourselves and each other under the Constitution of the United States made applicable to the States by the Fourteenth Amendment. Due Process, and the denial thereof, is what this case and this petition for certiorari are all about.

STATEMENT OF THE CASE

A. *Undisputed Facts*

1. On October 29,1976, Petitioners and Respondent entered into a note secured by a mortgage for Fifty Five Thousand ($55,000.00) Dollars payable in monthly installments on the first of each month. The interest rate set by the note was 8 1/2%.

2. For four years, from on or about October 29, 1976 through March 20, 1981, Petitioners paid the monthly installments by uncertified, personal checks. Not all payments were made on the first of the month. The Respondent accepted these payments by personal check without protest.

3. On or about March 20, 1981, at a time when mortgage interest rates in Connecticut varied between 18% and 19%, the Respondent rejected the tender of payment of all installments then due under the note. The only reason given for this rejection during the course of the litigation was that the tender was improper, to wit, payment was not made in "legal tender". The note was silent as to mode of payment but in the preceding four years none of the payments made by Petitioners and accepted by the Respondent were in "legal tender".

4. Subsequent to the rejection of payment, Respondent accelerated the debt and filed an action to foreclose on the mortgage.

B. *Respondent's Complaint*

Respondent filed an action in the Superior Court, Judicial District of Fairfield at Bridgeport. In its complaint the Respondent alleged at paragraph 3 that the Petitioners had not paid any installments on the note since December, 1980 and that the entire amount was then due under the note's acceleration clause. The complaint prayed for foreclosure of the mortgage.

C. Petitioners State Law Defenses

Petitioners state law defense to the action was a denial of the Respondent's allegation contained in paragraph 3 of non-payment and Petitioners in a separately stated Special Defense alleged proper tender of performance and improper rejection.

D. Petitioners Constitutional Law Counterclaims

The State of Connecticut has created an oligopoly in favor of state banks. By statute, no out of state banks can open branches in Connecticut. The state controls state banks through a regulatory function so thorough and pervasive as to validly raise questions as to whether or not the banks are any longer independent corporations or have become instrumentalities of the state. This control is extended to the point where bank inspectors will visit state banks annually, review individually numerous accounts and, usurping the prerogative of the bank, specifically instruct that certain accounts be accelerated and put out for collection. The Petitioners believed that the nexus between the state and the banks has reached the point where the state is acting directly through the bank and therefore the decision to accelerate and foreclose constitutes state action. If so, the Petitioners should have had an opportunity to contest that decision at the time it was made. To raise this issue, Petitioners interposed two counterclaims alleging violations of their constitutional rights citing specifically the Fourteenth Amendment to the U.S Constitution and 42 U.S.C. Section 1983 (1979).

E. Proceedings Below

After the issues were joined by the filing of the complaint and the answer, Petitioners requested a jury trial. Respondent then moved to strike the Special Defenses and Counterclaims. The Petitioners opposed the motion and in an opinion set forth at Appendix A the court denied said motion, however, as a reading of that opinion reveals the court considered the special defenses as being equitable considerations only, not legal defenses or claims of right. That decision became law of the case under Connecticut practice.

Respondent then moved for Partial Summary Judgment (Interlocutory) as to liability stating that Petitioners had no defenses. In support of the motion, Respondent filed an affidavit, set out at Appendix G in which the affiant did not aver personal knowledge and which alleged that Petitioners did not make their installment payments. The Petitioners as required by *Conn. Prac. Bk.* §380 filed an affidavit in opposition which is set forth at Appendix H. The Petitioners alleged that they did pay but payment was improperly rejected.

In Connecticut, a motion for summary judgment is a non-arguable motion. Petitioners filed their affidavit as required the day before the motion was to be heard and it is so dated and time stamped. What occured at the calendar call on the motion is best described by Respondent's counsel whose comments at a subsequent proceeding are set out at Appendix I. The clerk apparently misplaced the affidavit in opposition. Whether or not the court found the affidavit prior to decision is unknown because the Superior Court has refused to issue a Statement of Decision. The court took whatever papers it had and granted the motion without opinion. Petitioners were so advised by postcard. The summary judgment motion had not addressed the counterclaims. In fact, in the proceedings below Respondent never plead to the constitutional counterclaims.

Since a partial summary judgment under Connecticut practice is not a final judgment, Respondent moved for final judgment while the counterclaims comprising the constitutional claims remained outstanding. The Petitioners submitted a memorandum in opposition to said motion which was predicated upon the unresolved counterclaims. Without notice to the Petitioners, the court granted an unwritten, unnoticed motion to sever the constitutional counterclaims, entered a final judgment dated July 16, 1982 and ordered the property sold at public auction.

Petitioners took an immediate appeal to the Supreme Court which was docketed as #11573. Under Connecticut Practice, the filing of the appeal automatically stayed execution of judgment. Petitioners

simultaneously moved to compel the Superior Court to issue a written opinion as required by the rules of practice by making a Motion to Rectify the Record. The appeal raised the issues of (1) the improper grant of summary judgment and (2) the improper severance of the constitutional counterclaims. The motion to rectify was denied by the Supreme Court without prejudice to renew at the trial court level.

With the appeal pending and the constitutional issues temporarily held in abeyance, the pivotal event took place. Respondent moved to terminate the stay pending appeal. Since the Supreme Court at that time had a three to four year backlog, the impact of such a termination was obvious. Petitioners vigorously opposed the motion. It was at the hearing on this motion that Respondent's counsel stated for the record that on the day of the partial summary judgment motion, Petitioners had no counter affidavit in the file. On the day of the termination motion hearing, Petitioners affidavit was found, properly filed and time stamped. Despite this the court terminated the stay. Petitioners were thus faced with loss of their home for several years before the counterclaims would be tried or four years before the appeal was heard. The clear alternative was to abandon their defenses and refinance, thereby settling the case at a huge cost. Condemned by the Superior Court to navigate between "the rock and the whirlpool", the Petitioners adopted a procedure designed to both preserve their rights and their home.

Since the sale date set in the July 16, 1982 final judgment had passed while the stay was in effect, Respondent moved to reopen the final judgment to set a new sale date. On December 6, 1982 the court reopened the earlier final judgment and entered a new final judgment. That decision is set forth in Appendix F. This voided appeal # 11573 which was abandoned and subsequently dismissed. The Petitioners knew that an immediate appeal would avail them no protection against the loss of their home since the court would again terminate the stay. They also knew the summary judgment may have been entered due to clerical error. Therefore, rather

than take an immediate appeal they reclaimed a previously filed motion to set aside the summary judgment of May 28, 1982. They also filed a motion to set aside the final judgment of December 6, 1982. Those motions were printed together on March 18,1983 and argued that date. The argument was predicated on a consideration of the affidavits. Whether the clerk lost the affidavit or not, Petitioners had a constitutional right to a trial. The court after hearing argument denied the motion without opinion. An appeal was taken from that decision and docketed as #12086. Once again the Petitioners appealed the grant of Partial Summary Judgment and severance of the counterclaims.

Two weeks after the denial of the motion to set aside, the sale of the property at public auction took place. At that point the Petitioners sought the protection of the federal court. On April 15, 1983, an action was commenced in the U.S. District Court, District of Connecticut seeking a preliminary injunction against the deprivation of property without due process of law. The court denied that application but did not dismiss the action. A copy of its decision is set forth at Appendix B. An appeal, No. 83-7629, was taken to the Second Circuit Court of Appeals.

Theoretically, the second state appeal also merited a stay of execution pending the appeal. The Connecticut Supreme Court ruled, however, on Respondent's motion to dismiss appeal #12086 based upon the prior dismissal of #11573 that the second appeal would not be dismissed but it did not merit a stay and, further, that it would not consider the appeal of the severance or the counterclaims. That decision is set forth as Appendix C.

The Superior Court, unencumbered by a stay or preliminary injunction, confirmed the sale and subsequently instructed the Deputy Sheriff to physically remove the Petitioners and their belongings from the residence forthwith, which he did. The closing was held, title passed and the funds paid into the court. The Superior Court refused to release any of the proceeds of the sale, including proceeds due the Petitioners which they needed to pro-

vide shelter after being dispossessed of their home, unless and until the state court counterclaims based upon the Fourteenth Amendment, the action filed in the District Court based upon the denial of due process and the appeal of the District Court's denial of the preliminary injunction to the Second Circuit Court of Appeals were withdrawn in their entirety. The Petitioners protested, but financially had no alternative. Petitioners withdrew the counterclaims, the federal action and the appeal whereupon the funds were released.

On appeal to the Connecticut Supreme Court, Petitioners briefed and argued both the state law defenses and the violation of their constitutional rights under both the Connecticut and United States Constitution. The Petitioners also alluded to the misplaced affidavit. At oral argument Respondent conceded that there was no evidence in the file that the lower court had both affidavits before it at the time it decided the partial summary judgment motion but pointed out that as a result of the termination of the stay the court was faced with a *fait accompli*. The house had been sold and new owners had moved in. Some two months later the Supreme Court issued an opinion which avoided all of the constitutional and state law issues based upon a procedural ruling set forth without prior authority, either decisional or statutory, which was and is completely at odds with all prior decisional law and statutory authority on point. That decision is set forth in Appendix D. This writ prays review of that decision and the lower court's decision on the severance of the constitutional counterclaims which the Supreme Court declined to hear argument upon.

REASONS FOR GRANTING THE WRIT

I.

The Failure and Refusal of the State Superior Court Judge to Rule on the Constitutional Issues denied the Petitoners the Right to a Full and Fair Hearing and the Equal Protection of the law.

From the record of the court below it is clear that the Superior Court did not give any consideration to the constitutional questions raised by the counterclaims. In denying the Respondent's Motion to Strike the counterclaims, the court recognized their constitutional significance and that their resolution was necessary for a complete resolution of the case. See Appendix A at pg. A4. Nevertheless, so little heed did the court pay to the constitutional claims that it did not even require the Respondent to plead to the allegations, which remained undenied until Petitioners were compeled to withdraw them, before severing the counterclaims in the absence of the Petitioners[1]. The Superior Court then proceeded to judgment while these claims hung in procedural limbo. After execution in the form of sale of the home, as a condition of receiving their share of the proceeds of the sale, Petitioners were compelled to abandon all of their constitutional claims both in state court and in federal court.

It is well established that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This opportunity must be "granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and the hearing "must be appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The degree of formality and procedural requisites of an adequate hearing will vary from one situation to another. Where a deprivation of property is

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[1] As will be discussed more fully below, the procedure adopted by the court violated the rules of practice and state constitution.

involved the aggrieved individual must be given "an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). It is clear that "the state may not *finally* destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

The question Petitioners sought to raise is the same as that raised and considered by this Court in *Blum v. Yaretsky*, 457 U.S. 991 (1982). The mere fact that a private business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment. However, a state can be held responsible for a private decision when it has exercised coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the state. The critical factor is the allegation that the decision was itself based upon some rule of conduct or policy put forth by the state. The Petitioners sought to make and prove this allegation. This would have been a case of first impression but one which given the numerous regulations and close supervision exercised by the state as well as its practice of conducting yearly audits which include instructions to foreclose certain accounts is fairly raised. The Petitioners were never given the opportunity to pursue this claim.

This Court in the spirit of federalism has recognized the authority and ability of state courts to rule on constitutional issues. It has instructed the District Courts not to interfere with the state courts consideration of those constitutional issues voluntarily submitted to it. Will this Court not require those state courts to which it has given this authority to exercise that authority at a meaningful time, in a meaningful manner and prior to any substantial interference with property rights? If not, then the state courts will be free to do what the Superior Court has done, namely, to sever the constitutional claims and compel their abandonment either by execution or threat of execution.

The claimed constitutional right is a meaningful one. At the Superior Court level foreclosure is automatic. One need only refer to the instances where the Supreme Court has reversed a lower court foreclosure and the underlying facts of those cases to realize that a mortgagor is accorded no defense to a bank foreclosure at the trial court level. The only protection is through appeal but, due to the time and cost involved, that protection is often illusory. If Petitioners can establish their claim that the bank is an instrumentality of the state or that state action is involved, the state will be compelled to set up adequate procedures to protect mortgagors at that critical point, practices and procedures which would be subject to federal court review. Only then will the average mortgagor receive some protection.

Petitioners do not ask this Court to take up this complex issue now. What Petitioners ask is a review of the prior judgments of both the Superior Court and the U.S. District Court that execution could be had prior to the determination of this constitutional issue. *See* District Court Opinion Appendix B at A8. On this important issue, were the Petitioners provided a hearing at a meaningful time and in a meaningful manner?

II

The Failure of The Superior Court Judge to Afford The Petitioners The Benefit of Established Procedures Denied Them The Due Process of Law.

The failure of a state to afford a particular defendant the benefit of established procedures under state law may result in a denial of due process when the error made by the state court renders the state proceeding so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure. *Kilmas v. Mabry*, 599 F.2d 842, 848 (8th Cir.), *reh. and reh. en banc den.*, 603 F.2d 158 (1979) (citations omitted)

Where a state has established procedure which comports with due process, state and local officials are bound to follow those procedures. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982); *Wolf-Lillie v. Kenosha County Sheriff*, 504 F.Supp. 1, 4 (JE.D. Wis. 1979); *Whiteside v. Kay*, 446 F.Supp. 716, 719 (W.D. La. 1978). Connecticut in its constitution, its statutes and its Practice Book has provided a board spectrum of due process safeguards including, but not limited to, a jury trial for disputed issues of fact, a right to a statement of decision and a right to an unhampered appeal. By its procedural rulings, the Superior Court denied the Petitioners all of these due process safeguards.

A. Right to a Trial.

The constitutional provision of the State of Connecticut preserving a right to a jury trial is for all intents and purposes identical with the Seventh Amendment in guaranteeing the right to a jury trial where it existed at common law at the time the Connecticut Constitution was adopted. That right remains inviolate and is binding on the Superior Court. *Seals v. Hickey*, 186 Conn. 337, 350-51, 441 A.2d 604 (1982). As the Connecticut Supreme Court recently reiterated, in the courts of Connecticut the constitutional right to a jury trial cannot be cut off by the complainants invocation of the courts equity jurisdiction in the complaint. *Franchi v. Farmholme, Inc.*, 191 Conn. 201, 210-11, 464 A.2d 35 (1983); *See also Conn. Gen. Stat.* 52-219 (1982); *Conn. Prac. Bk.* 308 (1978). The factual issues presented to the trial court are essentially what is the contract and whether or not the contract has been breached. Under Connecticut law, a note and a mortgage given to secure it are separate instruments, executed for a different purpose, and an action for foreclosure of the mortgage and an action upon the note are regarded and treated as separate and distinct causes of action, although both may be pursued in a foreclosure suit. *Little v. United Investors Corp.*, 157 Conn. 44, 48, 245 A.2d 567 (1968); *West Haven Teachers Federal Credit Union v. Kimberly*, 31 Conn. Supp. 226, 227, 327 A.2d 596 (1974).

While Connecticut has not decided the issue to date, the Petitioners claimed then, and now, that an action on a contract, including a contract of debt or note, is an action at law, not equity, and the common law provided an absolute right to a jury trial on disputed issues of fact in an action on a note. *See Scott v. Neely*, 140 U.S. 106 (1890); *Dairy Queen v. Wood*, 369 U.S. 469 (1962). The Superior Court denied Petitioners not only a trial by jury, it denied them any trial at all. It did this by improperly granting Partial Summary Judgment (Interlocutory) as to liability.

Summary Judgment both under the Connecticut practice and Rule 56, Federal Rules of Civil Procedure upon which the Connecticut rules are modeled serves a very limited function. As one of the earliest cases interpreting the rule pointed out, "It must be born in mind that litigants have a constitutional right to have issues of fact decided by a jury. The function of the court upon a motion for summary judgment is to determine whether an issue of fact exists, not try that issue of fact if it does exist." *Hammill v. Smith*, 25 Conn. Supp. 183, 184-185, 199 A.2d 343 (1964).

In addition, the affidavits in support of the motion "*shall* be made on personal knowledge...and *shall* show affirmatively that the affiant is competent to testify to the matters stated therein." Conn. Prac. Bk. §381 (1978) (emphasis added). This requirement has been consistently held to mean that the affiant must specifically state that he has personal knowledge of the matters stated in the affidavit. *Evans Products Co. v. Clinton Building Supply*, 174 Conn. 512, 515,391 A. 2d 157 (1981).

The Petitioners thoroughly briefed and argued before the Supreme Court that the Superior Court could not have properly granted summary judgment for two significant reasons. First, the only affidavit filed in support of the motion which is set out at Appendix G did not aver personal knowledge as required. Secondly, the properly filed counter affidavit which is set forth at Appendix H created a dispute of material fact requiring a trial. The Superior Court had nevertheless granted the motion without opinion. The issues of the improper grant of summary judgment and

denial of Petitioners constitutional right to a trial were extensively briefed and argued. The Connecticut Supreme Court elected not to decide these issues.

2. Denial of a Statement of Decision.

The essence of a fair and impartial adjudication is not only a due process hearing but also a decision containing findings based on sufficient evidence. *U.S. v. Wood, Wire & Metal Lath, Int. U. Loc. No. 46*, 471 F.2d 408, 416 (2d Cir. 1973); *Brunnenkant v. Laird*, 360 F.Supp. 1330, 1331-32 (D.C. D.C. 1973). In Connecticut this statement of decision is required by Conn. Prac. Bk. §3060 B (1978). The Superior Court did not write such a decision. On four (4) separate occasions Petitioners requested the Connecticut courts to enunciate the reasons for its decision. A Rule 3060 B request was made as part of both Appeals #11573 and #12086. The Superior Court ignored both requests. As part of Appeal #11573, Petitioners moved before the Supreme Court pursuant to Conn. Prac. Bk. §3096(1) (1978) to require the Superior Court to write an opinion. The Supreme Court denied the motion and directed the Petitioners back to the Superior Court. After Appeal #12086 was filed, Petitioners renewed their request to the Superior Court pursuant to Conn. Prac. Bk. §3082 (1978). The Superior Court denied the application in an opinion set out at Appendix E[2]. Both the Connecticut practice and the fundamental principals of due process require that the Petitioners receive a statement of the reasons for the Superior Court's decision. None has ever been given to the Petitioners. This issue was fully briefed and argued to the Connecticut Supreme Court. The Court elected not to decide this issue.

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[2]Respondent has periodically referred to the denial of Petitioners motion as itself the Superior Court's final judgment. The opinion does not purport to be a judgment on the partial summary judgment motion and begins by stating that Petitioners are not entitled to a judgment. In addition, the summary nature of the opinion does not comply with the specific requisites of Conn. Prac. Bk. §3060 B. *See Ford v. Hotel & Restaurant Employees & Bartenders Union*, 152 Conn. 533, 534-535, 209 A.2d 187 (1965).

3. The right to an unhampered appeal.

The due process clause of the Fourteenth Amendment does not require the state to provide appellate review of civil cases. However, once a state has established avenues of appellate review due process requires that the avenues be kept "free of unreasoned distinctions that impede open and equal access to the courts." *Robinson v. Beto*, 426 F.2d 797, 798 (5th Cir. 1970). The Connecticut Supreme Court has recognized that "a party accorded the right of appellate review is entitled to the full and *unhampered* exercise of that right in accordance with the applicable rules of practice or statutes." *Hartford National Bank and Trust Co. v. Tucker*, 181 Conn. 296, 298, 435 A.2d 350 (1980) (emphasis added). The Petitioners maintain that the termination of the stay by the court under Appeal #11573 and the execution of the subsequent final judgment prior to the decision on the appeal effectively denied them the right to an unhampered appeal. With the termination of the stay the Petitioners faced dispossession of their home for an extended period of time while the appeal to the Supreme Court was pending.

Connecticut practice does provide for a termination of a stay pending appeal. Conn. Prac. Bk. § 3065 (1978). However, the power is not unlimited. Although the rules give the trial judge very broad discretion, since that power is a creature of statute and controlled by rule, the exercise of it is necessarily controlled by that rule. *Northeast Gas Transmission Co. v. Benedict*, 139 Conn. 36, 40, 89 A.2d 379 (1952). The power to terminate the stay is limited by rule to the "Judge who tried the case". The judge who terminated the stay had not tried the case. It was not even the same judge who granted summary judgment. Unlike a trial judge who is intimately familiar with the facts and has had an opportunity to personally observe the demeanor of the witnesses under oath, a judge sitting at the short calendar reviewing a "cold" file is not in the same position of intimacy as a trial judge would be. Here, the judge who terminated the stay did not know why summary judgment had been granted since no decision was filed. In view of the fact that he was

not the trial judge, the court's exercise of the power to terminate the stay under Conn. Prac. Bk. § 3065 was wrongful and in violation of the Petitioners constitutional rights. Further, the rule provides that the stay be terminated only if the appeal is taken for the purpose of delay or that the due administration of justice requires termination. Neither is present in this case.

The right to appellate review is part of the right of due process in Connecticut. The Defendants offer that under the rationale of *Boddie v. Connecticut, supra*, 401 U.S. at 379, this right as with the other due process procedures should be provided prior to the taking of any significant property right in the absence of a countervailing state interest. That countervailing state interest is not present in this case. At the time of termination of the stay Respondent had obtained a judgment for $66,697 secured by property valued at $180,000. See Appendix F. The bank was not insecure. Nor did the ends of justice require termination. Given the lack of any overriding state interest in immediate execution, the due process right of appeal prior to the taking of the property interest and the balance of the equities in favor of continuation of the stay, the termination of the stay was improper and served effectively to strip the Petitioners of their rights. Upon the Superior Court's termination of the stay Petitioners sought timely review of that order pursuant to Conn. Prac. Bk. § 3096 (1978). The Supreme Court denied the Motion to Review without opinion.

All of the above was fully briefed and argued. The Supreme Court elected not to decide this issue.

4. Denial of a Right to be heard on the Motion to Sever.

The Connecticut Practice Book has adopted a procedure by which parties are assured of being heard on all motions afflecting their rights. Every motion, unless relating to procedure in the course of a trial, shall be *in writing and served* on all parties. Conn. Prac. Bk. § 196 (1978) (emphasis added). All motions must then be placed on the short calendar list. No motions will be heard which are not

on said list. Conn. Prac. Bk. § 206 (1978). In Connecticut the short calendar list is printed in Hartford and automatically mailed to all parties of record. This assures that all counsel have notice and can be heard on any motions required to be printed on the calendar.

In this case on the Motion to Sever, the court denied the Petitioners due process of law. The case of *Winick v. Winick*, 153 Conn. 294, 216 A. 2d 185 (1965) is clearly on point and controlling. There, as here, the court disregarded the rules pertaining to motion practice and heard and decided an oral motion which had not been served on the opposing party nor printed on the Short Calendar. The Connecticut Supreme Court specifically held this practice to be in violation of the litigants due process rights. Nevertheless, the Superior Court followed precisely the same procedure criticized in *Winick*. It permitted the Respondent to make an unwritten, unserved, unprinted motion in the absence of the Petitioners and granted it. That this practice violated the Petitioners due process rights under Connecticut practice is beyond argument.

The Superior Court judge through his actions completely negated the due process safeguards afforded all litigants in Connecticut. Petitioners, without a trial in which they could prove their claims, without even a statement of decision as to why they were denied a trial and pending an appeal to the Supreme Court during which time Petitioners should have been protected by a stay, were dispossessed of a very valuable property right, their home.

The Supreme Court in a preliminary procedural ruling refused to hear argument on the improper severance but all other points set out above were briefed and argued. Petitioners cited both state and federal constitutional guarantees. The Supreme Court elected not to decide these issues.

III

The Connecticut Supreme Court Avoided Deciding The Federal Questions By Putting Forward Non Federal Grounds Of Decision Which Are Without Any Fair Or Substantial Support.

The gravamen of the Supreme Court decision is that the Petitioners on Appeal #12086 were attempting to revive an appeal, #11573, that has succumbed by being abandoned. The arguments being advanced by the Petitioners on Appeal #12086 could have been asserted on Appeal #11573 which was dismissed, therefore, since the Petitioners "[h]ad failed to take appropriate action on the dismissed appeal" neither the Superior Court nor the Supreme Court were required to nor would they address the state law and constitutional issues raised by the Petitioners argument and brief on either the motion to set aside or Appeal #12086. See Appendix D, pp. A13-A14.

To fully comprehend how novel and erroneous this procedural holding is, one must focus both on the chronology of events and the Connecticut Practice Book. The chronology is as follows:

May 28, 1982	Partial Summary Judgment (Interlocutory) granted.
July 16, 1982	Court grants unwritten, unnoticed motion to sever and enters final judgment.
August 3, 1982	Appeal #11573 docketed. Execution automatically stayed.
September 1, 1982	Superior Court terminates stay pending appeal.
September 7, 1982	Petitioners file Motion to Review with Supreme Court. Stay pending appeal automatically extended.

September 25, 1982	Original sale date passes during pendancy of Motion to Review.
November 17, 1982	Supreme Court denies without opinion Petitioners Motion to Review the termination of stay.
December 6, 1982	Superior Court Reopens Original Final Judgment and enters a new Final Judgment. Appendix F.
February 15, 1983	Date for Petitioners to file Brief for Appeal #11573 passes.
February 16, 1983	Appeal #11573 dismissed for failure to file Brief.
March 18, 1983	Superior Court denies Motion to Set Aside earlier decision.
March 31, 1983	Appeal #12086 filed appealing (1) entry of Summary Judgment; (2) severing of counterclaims; and (3) denial of due process.
April 10, 1983	Repondent moves to dismiss Appeal #12086 on the basis of the dismissal of Appeal #11573.
May 19, 1983	Supreme Court denies Motion to Dismiss Appeal #12086 based upon Respondent's Motion citing dismissal of Appeal #11573 but limits scope of Appeal. Appendix C.

In Connecticut, an appeal will only lie from a final judgment. *E.J. Hansen Elevator Inc. v. Stoll*, 167 Conn. 623, 626, 356 A.2d 893, 895 (1975); Conn. Prac. Bk. § 3000 (1978). This restriction is jurisdictional. The Connecticut Supreme Court only has jurisdic-

tion to hear appeals from final judgments and if it is not a final judgment the Supreme Court has no jurisdiction to hear the Appeal. *Morey v. Bernstein*, 37 Conn. Supp. 868, 869, 440 A. 2d 319 (1982).

The Supreme Court, the Superior Court, the U.S. District Court and the Petitioners all agree on one crucial point. The final judgment in this case was entered by the Superior Court on December 6, 1983. See Appendix B, p. A8, Appendix F, p. A16, and Appendix D, p. A14. What then happened to the original final judgment of July 16, 1982? Prior to entering the new final judgment on December 6, 1982, the Superior Court was required by both logic and procedure to reopen and set aside the earlier judgment, which it did. As the Court recites in the decision of December 6, 1983, "...the motion to reopen judgment should be and it is hereby granted..." The Superior Court then added an additional party, changed the amount due Respondent, set a new sale date and entered a new final judgment. Appendix F, p. A17.

Thus, after Appeal #11573 was docketed but before the Petitioners Appeal Brief was due, the Superior Court voided that appeal by specifically re-opening it and setting it aside. Under the Connecticut Rules of Practice and all prior decisional law, after the Superior Court reopened the final judgment of July 16, 1982, the Petitioners *could not appeal it further*. *Milford Trust Co. v. Greenberg*, 137 Conn. 277, 279, 77 A. 2d 80 (1950); *Ostroski v. Ostroski*, 135 Conn. 509, 66 A.2d 599 (1949); *Clover Farms, Inc. v. Kielwasser*, 134 Conn. 622, 59 A. 2d 550 (1948); *Morey v. Bernstein, supra*, 37 Conn. Supp. at 869; Moller and Horton, Connecticut Practice, 5th ed. pamph. pp. 24-25 (1981). This is because once the judgment was reopened, the Supreme Court lost all jurisdiction to hear the Appeal. Petitioners thought this legal issue was decided by the Supreme Court in Respondent's Motion to Dismiss Appeal #12086 which Respondent based upon the prior dismissal of Appeal #11573. The Supreme Court denied that motion but limited the Appeal. That decision is set out at Appendix C. In its Appeal Brief, Petitioners did not even brief the issue. Neither did the Respondent. The Petitioners did brief and argue all of the infirmi-

ties of the Superior Court's procedures and rulings including the constitutional issues, specifically denial of due process under both the State and U.S. Constitutions. In addition, Respondent conceded during oral argument before the Supreme Court that there was no evidence in the file that the Superior Court had the Petitioners affidavits before it at the time the Summary Judgment motion was granted. There is no valid, substantial basis for affirming the lower court decision. Nevertheless, the Supreme Court evaded all of the issues by departing in two significant respects from all prior Supreme Court rules of procedure. First, in order to justify what it was about to do, the Supreme Court *speculated* as to the reasoning of the Superior Court. This in and of itself is a significant departure from the rules the Supreme Court has adopted for itself. The Superior Court had not issued a memorandum of decision on the motion to set aside the judgment. In such a situation where the Supreme Court chooses to hear an appeal in the absence of a lower court Memorandum of Decision, the Supreme Court must review the pleadings, affidavits, memorandum of law and arguments to determine whether or not the lower court had ruled properly. *Spencer v. Good Earth Restaurant Corp.*, 164 Conn. 194, 197, 319 A.2d 403 (1972); *Town Bank & Trust Co. v. Benson*, 176 Conn. 304, 306, 407 A.2d 971 (1978). However, had it done so it would have been faced squarely with the issues of the lost affidavit which had been prominently argued in the court below, the lack of personal knowledge by Respondent's affiant and the dispute of material fact presented in the affidavits. Rather than face those issues, the Supreme Court speculated in a fashion helpful to its next departure from the established rules of Connecticut practice. The Supreme Court assumed that the Superior Court decided that because Petitioners failed to pursue Appeal #11573, the court did not have to consider the substantive arguments raised by the motion to set aside and therefore the Supreme Court need not consider the larger constitutional issues raised on appeal. The Supreme Court totally ignores the fact that the prior appeal "succumbed" not by the failure to file an appeal brief but by the setting aside of the final judgment of July 16, 1982 which was the basis of Appeal #11573. When the Superior Court set aside the judgment of July 16, 1982, the Supreme Court lost jurisdiction to hear Appeal #11573. Thus, reduced to simple terms, the Connecticut Supreme Court in its decision of May

15, 1984 on Petitioners Appeal #12086 decided that the Petitioners would be denied a review of the denial of federal constitutional rights and lower court state law errors because Petitioners failed to pursue an appeal which all prior decisional law stated Petitioners could not pursue and Petitioners were guilty of not perfecting an appeal which subsequent to December 6, 1982 the Supreme Court had no jurisdiction to hear. In this fashion, the Connecticut Supreme Court avoided deciding the constitutional and state law issues raised. This Court should note that the decision is offered without citing any prior authority, without referring to prior decisions completely contrary to the ruling herein or its own prior ruling on Respondent's Motion to Dismiss the Appeal.

But even assuming, *arguendo*, that the Supreme Court's reading of the appellate rules is correct, the decision completely ignores the impact of the termination of the stay. This Court has recognized, even if only in dissent, the trauma of a loss of the home. If Petitioners misstepped procedurally it was because of the threat of this trauma. Had Petitioners been permitted to pursue Appeal #11573 in an unhampered manner then there would have been no question as to the issues attempted to be raised by both appeals being properly before the court. Thus, even if the Supreme Court's rationale is accepted, it leaves unresolved questions of whether Petitioners error was occasioned by waiver, negligence or the denial of their due process right to an unhampered appeal.

States are not free to avoid deciding constitutional issues on inadequate state grounds. *O'Connor v. Ohio*, 385 U.S. 92 (1966). Whether a given practice is so unfair as to deny due process is always a question of federal constitutional law. *Cronnon v. State of Ala.*, 557 F.2d 472 (5th Cir. 1977), *appeal after remand*, 587 F.2d 246 , *cert. den.*, 440 U.S. 974 (1979). To trigger application of due process concepts, there must be both governmental action and deprivation of a "life, liberty or property" interest to warrant constitutional protection. *Banks v. Block*, 700 F.2d 292 (6th Cir. 1983). A foreclosure proceeding in Connecticut clearly involves state action. As Petitioners fully briefed and argued to the Connecticut Supreme Court and the U.S. District Court, the necessary

participation of the courts of Connecticut in the foreclosure process which includes not only entry of judgment but appointment of a committee to sell the property, approval of sale, assessment of costs and many other acts of participation which require the court to play a substantial role in the foreclosure process involves state action. *Dieffenbach v. Attorney General*, 604 F.2d 187, 193-194 (2d Cir. 1979); *Fitzgerald v. Cleland*, 498 F.Supp. 341, 348 (Maine 1980); *Turner v. Blackburn*, 389 F.Supp. 1250, 1254-58 (W.D. N.C. 1975) (Three-Judge Court). Even if the Connecticut system of foreclosure did not involve state action, the role of the judge in denying the benefits of established state procedures to the Petitioners would satisfy the state action requirements. *Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980). Clearly, a significant property interest is involved. Federal constitutional issues as well as state law issues were squarely before both the Superior Court and the Connecticut Supreme Court, nevertheless, those courts used novel procedural rulings to avoid facing these constitutional issues.

It is well settled that a state court may not avoid deciding the federal questions and thus defeat the jurisdiction of this court by putting forward non-federal grounds of decision which are without any fair or substantial support. *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). This court has jurisdiction where a state court's procedural holdings could not be reconciled with its prior holdings. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their constitutional rights." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 457-458 (1950). If non-federal grounds, plainly untenable, may be put forward successfully, this Court's power to review easily may be avoided. *Ward v. Love County*, 253 U.S. 17, 22-23 (1920). In the courts below, the Petitioners scrupulously adhered to the Practice Book and the decisional law thereunder. Both courts adopted practices and procedures totally at odds with the Practice Book and prior case law to avoid confronting Petitioners fairly raised constitutional issues and state law defenses. This court may also note that these purported non-federal grounds for decision are procedural. "When as here there is a plain assertion of federal rights

in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail...whether the right was denied or not given due recognition by the [state court]...is a question as to which the [Petitioners] are entitled to invoke [this Court's] judgment." *Love v. Griffith*, 266 U.S. 32, 33-34 (1924) (Holmes, J). A failure to adhere to a state procedural requirement does not foreclose this Courts review of a federal claim if "it is an obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945); *Wolfe v. North Carolina, supra*, 364 U.S. at 195.

There is no question that the Connecticut Supreme Court had the jurisdiction to hear and determine the federal constitutional questions as had the Superior Court. Both courts elected not to decide these issues.

The Petitioners were denied their constitutionally protected privilege to present their claim that the banks decision to accelerate constituted state action and were denied the benefits of established state procedures to defend against loss of a most treasured property right. On appeal, the Connecticut Supreme Court artfully avoided constitutional issues, both state and federal, raised before it by adopting a procedural ruling offered without precedent which is both novel and untenable. Thus the Connecticut Supreme Court attempts to avoid both the jurisdiction of this Court and deciding whether or not the Petitioners have had property seized by state action without due process of law in violation of both the state and federal constitutional prohibitions.

CONCLUSION

For the above reasons, Petitioners respectfully submit that writs of certiorari should issue.

Respectfully submitted,
Robert A. Heghmann
Attorney for Petitioner

CERTIFICATION

I hereby certify that a copy of the above has been served upon the Supreme Court of the State of Connecticut, the Superior Court of the Judicial District of Fairfield and all parties to the proceedings below in accordance with the Connecticut Practice Book.

_____

Commissioner of the Superior Court.

No. 84 -

In The

Supreme Court of the United States

OCTOBER TERM, 1984

Robert A. Heghmann and
Beatrice M. Heghmann,
Petitioners,

v.

Connecticut Savings Bank,
Respondent.

APPENDIX

APPENDIX A

NO. 194304	) SUPERIOR COURT
CONNECTICUT SAVINGS BANK	) JUDICIAL DISTRICT OF FAIRFIELD
VS.	) AT BRIDGEPORT
ROBERT A. HEGHMANN, EL AL	) MARCH 4, 1982

MEMORANDUM OF DECISION

I

FACTS

Defendants entered a rate agreement promising to pay plaintiff $55,000 at 8 1/2% interest per annum, in monthly installments of $422.90 due the first day of each month. The rate was secured by a mortgage recorded on November 2, 1976. The rate contained an option clause that stated if the note remained unpaid for a period of 10 days after the due date, the whole debt would become due without any demand or notice.

On December 1, 1980, defendants stopped making monthly payments. Later on March 20, 1981, defendants allege they attempted to render payment of the arrearages due plus the penalty charges, at the request of the plaintiff's agent, by personal check. Plaintiff rejected payment in this manner demanding a certified or bank check. Plaintiff then exercised the option clause and is suing for the balance due in an action to foreclose the mortgage.

Defendants deny that they failed to make payments after December 1, 1980, and assert two special defenses and two counterclaims seeking injunctive relief, money damages and release of all encumbrances on the property. Plaintiff moves to strike the special defenses as legally insufficient under state law and to strike the counterclaims as improper.

II

SPECIAL DEFENSES

Defendants' special defenses are: (1) that defendants tendered payment and such tender was wrongfully rejected by plaintiffs and (2) that plaintiff waived its right to exercise the option clause by electing to demand payment of all arrearages at once and representing that it would sue on the balance due. The sufficiency of these defenses is properly raised by a motion to strike. Conn. Practice Bk. §152 (1978); *Alarm Applications v. Simsbury Volunteer Fire Co.*, 41 Conn. L. J. No. 32, at 13, 14 (February 5, 1980); 1 Stephenson, Conn. Civ. Pro. §116, (2d ed. 1980).

The Court views a motion to strike limited to those grounds specified within. *Meredith v. Police Commission*, 42 Conn. L. J. No. 7, at 24, 25 (August 21, 1980). All facts "well pleaded" are admitted as true once the Court will construe the pleading in a manner most favorable to the pleader. *Amodio v. Cunningham*, 42 Conn. L. J. No. 7 at 2 (August 12, 1980); *Conn. State Oil v. Carbone*, 36 Conn. Sup. 181, 182, 415 A. 2d 771 (1980). The motion cannot be aided by the assumption of facts not alleged herein. *Fraser v. Henninger*, 173 Conn. S2, 60, 376 A.2d 406 (1977).

An action to foreclose a mortgage is peculiarly an equitable one. *Little v. United Investors Corp.*, 157 Conn. 44, 48, 24 S.A. 2d 567 (1968); Brand v. Wilson, 120 Conn. 211, 214, 180 A. 293 (1935). When a rate is secured by a mortgage, the two are viewed as separate instruments and an action to foreclose and an action on the note are treated as separate and distinct causes of action. *Little, id.* at 48. The action at hand is one to foreclose on the mortgage. At common law, the available defenses to a mortgage foreclosure are limited to such things as payment, discharge, release, satisfaction or the invalidity of the lien. *Connecticut Savings Bank v. Reilly*, 12 Conn. Sup. 327, 327 (1944); *Petterson v. Weinstock*, 106 Conn. 436, 441, 138A.433 (1927). Additionally, some courts have recognized waiver, mistake or accident as defenses in foreclosure actions. See *Derway v. Lomonico*, 4 Conn. Sup. 184 (1936); Petterson, Id.; *Console v. Torchinsky*, 97 Conn. 353, 357, 116A.613 (1922); 59 C.J.S., Mortgages §506 (1949).

In the present action, defendants' special defenses are proper in light of the above-cited case law. Since the foreclosure action is an equitable one, such equitable defenses as payment and waiver should be allowed in light of the state's liberal interpretation of equitable rules in working out "just results." *Petterson, id.* at 446. Since the defendants allege sufficient facts in support of each special defense, the defenses should not be stricken.

Therefore, the special defenses of payment and waiver should not be stricken as legally insufficient in a mortgage foreclosure action. The motion to strike the special defenses is denied.

III

COUNTERCLAIM ISSUE

Defendants' counterclaims are: (1) plaintiff's actions were arbitrary and capricious in violation of 14th amendment due process rights and (2) plaintiff's actions deprived defendants of rights, privileges and immunities secured by the constitution, 42 U.S.C. §1983; §1985 and §1986. Defendants seek injunctive relief, money damages and release of all encumbrances on the property in question.

The propriety of counterclaims is governed by Connecticut Practice Book §168 that allows a counterclaim "provided it arises out of the same transaction" alleged in the plaintiff's complaint. See 1 Stephenson, Conn. Civ. Pro. §129 (2d ed 1979). A defendant may bring in for adjudication any matter that is so connected with the matter in controversy under the original complaint that its consideration by the court is necessary for a full determination of the rights of the parties as to such matter in controversy. *Springfield-Dewitt Gardens v. Wood*, 143 Conn. 708, 713, 125A 2d 488 (1956); *Schaefer v. O.K. Tool*, 110 Conn. 528, 530-531, 148A.330 (1930); *Harral v. Leverty*, 50 Conn. 46, 64, 47A...599 (1882). The subject matter of a counterclaim to a foreclosure action must have some connection to the making, validity or enforcement of the mortgage. *Connecticut Savings Bank v. Reilly*, 12 Conn. Sup. 328 (1944); see Harral, *id.*

In the present action, defendants' counterclaims do not relate to the making or validity of the mortgage, but do relate to the enforcement of the mortgage. Since defendants are suing the plaintiff for violation of due process guarantees, this case is distinguishable from *Society for Savings v. Chestnut Estates*, 176 Conn. 563, 572-573, 409 A.2d 1020 (1979), relied on by defendants, in which a counterclaim challenged the constitutionality of statutory foreclosure proceedings and was allowed. In the present action, defendants are not challenging the constitutionality of the statute, but they challenge the manner in which plaintiff decided to foreclose and enforce the mortgage. Such an action does arise out of the same mortgage transaction and may be necessary to a full determination of the rights of the parties, especially since plaintiff demands release of all encumbrances on the property as part of his relief.

Therefore, the motion to strike the counterclaims is denied.

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Jacobson, J.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT A. HEGHMANN and BEATRICE M. HEGHMANN,	:	
PLAINTIFFS,	:	
VS.	:	CIVIL NO. B-83-247
THE CONNECTICUT SAVINGS BANK CITIBANK, N.A., ALFRED SANTANIELLO, JR., AND THE STATE OF CONNECTICUT	:	

RULING ON PLAINTIFF'S APPLICATIONS

Taking the facts as pleaded in the plaintiff's amended complaint as true for consideration of the plaintiffs' applications, the Court denies both plaintiffs' application for a temporary restraining order and application for a preliminary injunction. The forms of relief sought are extraordinary remedies and will only be granted upon a clear showing of all necessary elements, *see Diversified Mortg. Investors v. United States Life Ins. Co.*, 544 F.2d 571, 576 (2d Cir. 1976), and should be granted only with "great restraint and caution." *Thomas v. Veterans Administration*, 467 F. Supp. 458, 461 (D. Conn. 1979). It is the opinion of the Court that the plaintiffs have made no such clear showing. In this regard it is sufficient to state that the Court finds that plaintiffs have established neither likelihood of success of the merits nor sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the moving party. *See United States v. Beechcraft East, Inc.*, Docket No. 82-6343, slip op. at 4083-84 (2d Cir. May 26, 1983).

The amended complaint reveals that, after Connecticut Savings Bank (C.S.B.) was unsuccessful in state court on a motion to strike the Heghmanns' special defenses and counterclaims, C.S.B. moved for partial summary judgment against the Heghmanns--the plaintiffs in this matter and the defendants in the state court foreclosure proceeding. The plaintiffs herein complain that despite their filing an opposing affidavit, the state court judge, in view of the prior ruling on the motion to strike, "inexplicably" granted C.S.B.'s motion. Amended Complaint, ¶24. Plaintiffs further complain that the state court rendered no written opinion on its decision to grant partial summary judgment, allegedly in contravention of state court rules, despite plaintiffs' motions requesting such an opinion.

The core of this complaint, as it appears to this Court, is that the plaintiffs cannot believe that the state court judge ruled against them on the motion for partial summary judgment. What the plaintiffs seem to ignore, or fail to realize, is that the decision on the motion to strike did not preclude the state court judge from granting the motion for partial summary judgment. There are simply different standards employed when considering each motion, and such rulings are not necessarily inconsistent. Further, it is undisputed that plaintiffs had notice of the C.S.B. motion and the opportunity to be heard on the motion. That plaintiffs decided to rest on the affidavit filed in opposition to the motion, rather than to appear in court when the motion for partial summary judgment was heard, provides no basis for a due process claim. Moreover, assuming *arguendo* that the state court judge erroneously decided the motion for partial summary judgment, that fact would not provide plaintiffs a basis for coming into federal court on a §1983 claim. This Federal District Court does not sit as the Connecticut Supreme Court when a state court litigant is dissatisfied with the merits of a state judge's ruling and brings a §1983 claim here on that basis. *See, e.g. Whiteside v. State of Washington*, 534 F. Supp. 774, 777 (E.D. Wash. 1982) (§1983 was "not designed for use as a substitute for appeal in the state courts"). In addition, plaintiffs incorrectly rely on *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *United States v. Wood, Wire & Metal Lathers Int'l Union, Local No. 46*, 471 F.2d 408, 416 (2d Cir. 1973), for the proposition that due process

requires judges to render written decisions. Justice Douglas' dissent in *Roth*, 408 U.S. at 584-85, and the just noted Second Circuit decision address the situation where the information upon which a factfinder relies to draw conclusions of fact are not known to the parties involved in the controversy.[1] In such instances, the basis of judgment is not available to the parties, which violates the parties's rights to due process. This simply is not the situation in a court case where the basis of judgment, i.e. the papers filed by each party, are matters of public record freely available to each party in the suit. Plaintiffs further reliance on *United States v. White*, 429 F.Supp. 1245, 1253 (N.D. Miss. 1977), which cites *Goldberg v. Kelly*, 397 U.S. 254 (1970) is misplaced, as these cases also refer to such agency determinations rather than judicial determinations. *See Goldberg, supra*, at 271 (citing *Ohio Bell Tel.Co. v. PUC*, 301 U.S. 292 (1937), which was relied on in *U.S. v. Wood, Wire & Metal Lathers Int'l Union, supra*, at 416). Moreover, in the case at bar, the record shows that the plaintiffs' initial motion for a written opinion was improperly directed to the Connecticut Supreme Court rather than to the Superior Court, and was consequently denied without prejudice. *See* Heghmann Affidavit, Exh. J. The plaintiffs' subsequent application to the Superior Court for a written

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[1] The majority in *Roth* did not hold that the University violated the respondent's rights to due process by refusing to give a statement of reasons for deciding not to rehire him. This issue was not reached as the Court found that the respondent was deprived of neither a "liberty" nor a "property" interest by the University's decision. Board of Regents v. Roth, 408 U.S. 564, 575, 578 (1972). In dissent, Justice Douglas felt that the teacher's interest was sufficient to implicate his due process rights, and that, in this nonjudicial context, the teacher was entitled to a statement of reasons and an opportunity to respond to those statements. Roth, *supra*, at 585-586. Justice Marshall, also in dissent, felt that "liberty" and "property" were affected, entitling the teacher, in this situation, to a statement of reasons and an opportunity to respond thereto. Roth, *supra*, at 590. None of the statements in *Roth* concerning the necessity of stating the reasons for a decision relate or apply to a judicial setting, where the rules under which a judge must decide matters are clear and known to the parties, and where all documents before the court are in the public record. Perry v. Sinderman, 408 U.S. 593 (1972), involved the same nonjudicial setting.

opinion was returned by the Clerk of the Court without action because the appeal to which it referred had previously been dismissed by the Connecticut Supreme Court. *See* Heghmann Affidavit Exh. K. There is no allegation or indication that plaintiffs have renewed their request for a written opinion in any subsequent proceeding.

Plaintiffs' next grievance relates to a motion for strict foreclosure by C.S.B. and Citibank. Plaintiffs opposed this motion with paper but again were not present in court when the motion was heard. The basis of the defense was that counterclaims were outstanding against C.S.B. Plaintiffs allege that when the motion was heard in court, C.S.B. and Citibank submitted an unnoticed, unprinted motion to sever the counterclaims, which the court then granted. Thereupon, the court entered a final judgment of foreclosure by sale.

This Court has difficulty in understanding why a severance of *counterclaims* is cause for plaintiffs to complain. Counterclaims, as distinguished from defenses, do not controvert a complaining party's allegations found in the complaint. Thus, whatever the result of a determination on the counterclaims, it should have no effect on whether judgment should or should not enter on the complaint. Section 386 of the Practice Book (West 2d ed. 1979), even allows for final judgment to enter for a plaintiff on that portion of a claim to which no *defense* applies while severing the remainder of the claim. In the case at bar, there were no remaining defenses to the plaintiffs' claim. The Heghmanns had only remaining counterclaims, which are still pending in state court for the plaintiffs herein to press against C.S.B., if they so desire.

Plaintiffs next appealed the entry of the final judgment, the granting of the motion for partial summary judgment, and the granting of the motion to sever the counterclaims. The Superior Court, however, subsequently reopened the final judgment, and on or about December 6, 1983 entered a new final judgment. This action by the Superior Court renders moot any of plaintiffs' complaints concerning the termination of the stay that accompanied this appeal of the final judgment. *See* Amended Complaint, ¶¶29-30.

Upon receiving notice of the second entry of final judgment, plaintiffs decided not to take an immediate appeal. Instead, plaintiffs apparently moved to reopen the final judgment of December 6, 1982 "as clearly improper and probably due to clerical error." See Amended Complaint ¶32. This motion was denied on or about March 31, 1983 and plaintiffs allegedly took a timely appeal of this denial to the Connecticut Supreme Court. Plaitniffs further allege that under Connecticut law, this appeal carries with it an automatic stay of any execution of the judgment. Plaintiffs assert that "nevertheless, on April 2, 1983, the defendants entered upon the property . . . and sold it at public auction." Amended Complaint, ¶ 32. The defendants then moved to confirm the sale and the state court, on or about April 22, 1983, apparently granted the motion to confirm the sale "despite the fact of the pending appeal and the automatic stay provided therewith." Amended Complaint, ¶ 32.

It is clear from the pleadings that plaintiffs were aware of the entry of the second final judgment and had the *opportunity* to immediately appeal therefrom, but instead chose to pursue another course. If the plaintiffs lost by this decision the right to appeal the entry of the final judgment, and the underlying rulings, it was due to their choice and not to a denial of due process. Additionally, the tactical course of moving to reopen has not left the plaintiffs without a hearing in the state courts. While the court denied the motion to reopen, plaintiffs allege that they have filed a timely appeal. Thus, at the moment, there is an appeal pending in the Connecticut Supreme Court on this matter. Further, any stay in connection with the appeal is a matter to be brought to the attention of the state court.[2]

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[2] This Court, on April 22, 1983, denied the plaintiff's earlier application for a temporary restraining order, partially on the basis that if a stay was required by state law, plaintiffs could bring that situation to the attention of the state court judge who would hear the motion to confirm the sale on that date. Thus, the Court would assume that plaintiffs had this opportunity to be heard on this issue in state court. Plaintiffs, in their amended complaint, dated May 17, 1983 and filed with the Court on May 23, 1983, have not alleged that this opportunity was denied them.

Based on the above, the Court does not perceive that the plaintiffs' due process rights have been implicated by the facts alleged in the amended complaint to the extent that it can say that there is a likelihood of plaintiffs succeeding on the merits or that plaintiffs have raised sufficiently serious questions going to the merits to make them a fair ground for litigation.

The plaintiffs' amended complaint also speaks in terms of equal protection and purports to set forth an equal protection claim. Considering all the facts pleaded therein as true for these purposes, the Court is at a loss to perceive an equal protection claim. In this regard, plaintiffs have also not met the standards for the issuance of the injunctive relief they seek.[3] *See United States v. Beechcraft East, Inc., supra*, slip op. at 4083-84; *Diversity Mortg. Investors, supra*, at 576.

Based on the foregoing, the plaintiffs' applications for a temporary restraining order and a preliminary injunction are denied.

It is SO ORDERED.

Dated at Bridgeport, Connecticut, this 16th day of June, 1983.

T.F. GILROY DALY, Chief Judge
United States District Court

[3] The Court is mindful that the plaintiffs are proceeding *pro se* in this action. However, plaintiff Robert A. Heghmann, whose name and signature appear on all the pleadings filed for the plaintiffs in this case, is not the typical *pro se* litigant. Mr. Heghmann is an attorney and is admitted to practice before this Court. The Court also notes that plaintiffs have had an opportunity to submit any desired papers and have even taken the step of filing an amended complaint.

APPENDIX C

NO. 12086
CONNECTICUT SAVINGS BANK : SUPREME COURT

VS. : STATE OF CONNECTICUT

ROBERT A. HEGHMANN ET AL : MAY 19, 1983

ORDER

THE MOTION OF THE PLAINTIFF TO DISMISS THE APPEAL OF THE DEFENDANTS HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED GRANTED INSOFAR AS THE APPEAL IS TAKEN FROM THE MAY 28, 1982 INTERLOCUTORY SUMMARY JUDGMENT AND THE DECISION SEVERING THE COUNTERCLAIMS. INSOFAR AS THE APPEAL IS TAKEN FROM "A FINAL JUDGMENT BY THE COURT ON MARCH 18, 1983 DENYING A MOTION TO SET ASIDE A JUDGMENT DATED DECEMBER 6, 1982," THE MOTION TO DISMISS IS DENIED WITHOUT PREJUDICE TO ITS BEING RESUBMITTED AFTER RECEIPT OF THE TRANSCRIPT OF THE MARCH 18, 1983 ARGUMENT.

NO APPEAL HAVING BEEN TAKEN FROM THE DECEMBER 6, 1982 ORDER OF FORECLOSURE BY SALE TO TAKE PLACE ON APRIL 2, 1983, THAT ORDER IS NOT STAYED BY THIS APPEAL AND THE FORECLOSURE MAY PROCEED.

BY THE COURT

CHIEF CLERK

APPENDIX D

CONNECTICUT SAVINGS BANK *v.*
R.A. HEGHMANN ET AL.
(12086)

PETERS, HEALEY, PARSKEY, SHEA AND GRILLO, JS.

The defendants, whose appeal from a summary judgment and a judgment of foreclosure by sale had been dismissed for failure to file a brief, appealed from the denial of their motion to open a later judgment rendered for the purpose of setting a new sale date. *Held* that the trial court did not abuse its discretion in denying that motion.

Argued March 2 - decision released May 15, 1984

Action for the foreclosure of a mortgage, and for other relief, brought to the Superior Court in the judicial district of Fairfield at Bridgeport, where the court, *Belinkie, J.*, granted the plaintiff's motion for a summary judgment thereon, and the court, *Jacobson, J.*, ordered a foreclosure by sale, from which the named defendant et al. appealed to this court. *No error.*

Robert A. Heghmann, for appellants (defendants).

Richard B. Cramer, for the appellee (plaintiff).

PER CURIAM. The sequence of events relevant to a consideration of the issue presented in this appeal is as follows: On May 12, 1981, the plaintiff, Connecticut Savings Bank, commenced a foreclosure action against the defendants, Robert A. Heghmann and Beatrice M. Heghmann, who allegedly defaulted on the payment terms of a mortgage note and deed executed in October, 1976. On May 28, 1982, the trial court, *Belinkie, J.*, rendered an interlocu-

tory summary judgment against both defendants.[1] The court, relying on the plaintiff's affidavit and other documentary proof and on the defendants' opposing affidavit, concluded that no genuine issue existed. On July 16, 1982, the court, *Jacobson, J.*, rendered a judgment of foreclosure by sale. On August 3, 1982, the defendants took an appeal to this court from this judgment, the granting of the summary judgment, and the severing of the defendants' counterclaims. This appeal was dismissed on February 16, 1983, since the defendants had failed to file their brief.

On December 6, 1982, the judgment of July 16 was opened for the purpose of setting a new sale date, April 2, 1983, the previous sale date having passed.[2] The defendants did not appeal from the judgment of December 6, 1982, but on March 7, 1983 moved to open the final judgment rendered on December 6, 1982. This motion was denied on March 18, 1983.

The defendants now appeal from the denial of the motion to open the judgment of December 6, 1982, "and the prior decisions granting summary judgments and severing." The crux of the defendants' appeal pertains to the summary judgment upon which the final judgment of December 6, 1982 was predicated. They argue that a review of the affidavits illustrates that the rendering of summary judgment was improper. They maintain that the pleadings and the defendants' affidavit make it "abundantly clear" that the defendants tendered payment, that they were entitled to a jury trial on the issues, and that they were denied due process of law.

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[1] On September 24, 1981, in addition to their answer to the complaint, the defendants filed a counterclaim. Succinctly stated, their responses were claims for injunctive relief and money damages encompassed the following allegations: The defendants tendered performance. Payment was rejected by the plaintiff. The plaintiff's activity involved state action, and thus the defendants were deprived of due process of law.

2 On November 17, 1982, following the trial court's termination of stay of the judgment of July 16, 1982, this court denied relief from that order.

The question presented reduces itself to a consideration of whether the trial court abused its discretion in denying the motion to open the judgment of December 6, 1982. *Freccia* v. *Martin*, 163 Conn. 160, 165, 302 A.2d 280 (1972). We find no such abuse.

It is beyond cavil that the sine qua non of the judgment of December 6, 1982, establishing a new date for the sale of the premises, was the July 16, 1982 judgment of foreclosure which was based upon the interlocutory summary judgment rendered on May 28, 1982. The defendants insist that the trial court abused its discretion "in not setting aside the summary judgment and the final judgment predicated upon it." A review of the defendants preliminary statement of issues in their appeal of August 3, 1982, questioning in a generalized way the propriety of the court's granting the summary judgment indicates that the arguments now being advanced by the defendants could have been asserted in that appeal which was dismissed. At the hearing on the motion to open the judgment, the trial court observed that it was "well aware" of the fact that the defendants had failed to take appropriate action in the dismissed appeal.[3]

Suffice it to say, the defendants are obliquely attempting to revive an appeal that has succumbed by being abandoned. The trial court did not abuse its discretion in denying the motion to open the judgment.

There is no error.

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[3] At the oral argument on the motion to open the judgment of December 9, the trial court was asked "*again* to reconsider the events of May 28th without spending another year or two going back to the Supreme Court." (Emphasis added.)

APPENDIX E

Exhibit XIV

NO. 19 43 04

CONNECTICUT SAVINGS BANK	: SUPERIOR COURT
VS.	: JUDICIAL DISTRCT OF FAIRFIELD AT BRIDGEPORT
ROBERT A. HEGHMANN, ET ALS.	: MAY 25, 1983

MEMORANDUM RE: MOTION TO RECTIFY RECORD

The defendants have filed this motion to rectify the record pending appeal. Specifically the defendants claim that in accordance with P. B. § 3060B, they are entitled to a written memorandum of the reasons for the decision of this court rendered May 28, 1982 granting the plaintiff's motion for interlocutory summary judgment.

An examination of the file reveals that this appeal was dismissed by the Supreme Court on February 16, 1983, and the Rectification of Appeal was returned to the defendants on March 1, 1983.

Apart from this, P. B. § 3060B applies to judgments in trials before this court, not motions heard on short calendar. It is fundamental that there can be only one reason for granting a motion for summary judgment, namely, the absence of any genuine issue of material fact. *United Oil Co. v. Urban Redevelopment Comm.*, 158 Conn. 364. This motion was granted because the court was unable to find such genuine issue.

Belinkie, State Trial Referee

APPENDIX F

STATE OF CONNECTICUT

NO. 19 43 04

CONNECTICUT SAVINGS BANK, a Connecticut Corporation located in New Haven	:	Superior Court
VS.	:	Judicial District of Fairfield at Bridgeport
ROBERT A. HEGHMANN, of Westport BEATRICE A. HEGHMANN, of Westport, WESTPORT BANK & TRUST COMPANY, of Westport, CITIBANK N.A., of New York, and BERGER & KATZ, ESQ.	:	December 6, 1982

PRESENT: Hon. Burton J. Jacobson, Judge

JUDGMENT OF FORECLOSURE BY SALE AFTER OPENING OF ORIGINAL JUDGMENT

A summary judgment having been rendered by the Court against the defendants Robert A. Heghmann and Beatrice M. Heghmann on May 28, 1982 as on file, said action came thence to June 17, 1982 when the defendant, Citibank N.A., filed its motion for judgment of foreclosure by sale on a certain piece or parcel of land situated:

NORTHERLY:	405.22 feet, more or less, by the center line of private road, known as Highwood Lane;

EASTERLY:	212.71 feet, more or less, in part by Lot "M" and in part by the center line of said private road known as Highwood Lane;
SOUTHERLY:	150 feet, more or less, by Lot "L";
SOUTHWESTERLY:	244.40 feet, more or less, by Lot "L", and in part by said private road known as Highwood Lane;

and thence to July 16, 1982 when the parties appeared and were heard on said motion, defaults having been entered against the defendants Westport Bank and Trust Company, Citibank, N.A., and the plaintiff's oral motion to sever the counterclaim having been granted by the court, and when a judgment of foreclosure by sale was duly entered, as on file, and thence to August 3, 1982 when the defendants, Robert A. Heghmann and Beatrice M. Heghmann appealed the judgment to the Connecticut supreme court, and thence to September 1, 1982 when the plaintiff's motion to terminate appellate stay was granted by the court, and the defendants filed a motion for review of order to the supreme court, and thence to November 17, 1982 when the defendant's motion for review of termination of the stay was granted and the relief sought therein was denied and thence to November 30, 1982 when the defendant's motion to reargue was denied, and thence to the present time when motions as on file to reopen the judgment and set a new sale date and to reopen and modify the judgment to add a party defendant were claimed and when the appearing parties were given an opportunity to be heard on said motions, as on file.

The court finds that the motion to be made a party defendant should be and it is hereby granted and default entered against the defendants, Berger & Katz, Esq. and the motion to reopen judgment should be and it is hereby granted, and the sum of $66,697.36, which sum includes an attorney's fee of $3,452.50, is due the plaintiff on its mortgage together with interest thereon from July 16, 1982, the date of the original judgment and an additional attorney's fee of $735.00, and that a foreclosure by sale should be and is hereby ordered.

And it is further adjudged that Alfred Santaniello, 1 Mott Avenue, Norwalk, Connecticut is appointed as a committee to sell the mortgaged premises above described; that he shall sell the same as a whole, subject to the approval of the court, free and clear of the mortgage herein being foreclosed and of all claims subsequent in right thereto the holders of which are bound by this action (subject to any and all liens either choate or inchoate of any nature affecting said premises), at public auction on the premises on April 2, 1983 at 12:00 noon unless, at or before that time, the sum found to be due upon the mortgage debt, with interest from the date of the original judgment, an additional attorney's fee as found to be due, costs taxed at $, such expenses for advertising and for the services of the committee as may have been incurred at the date of such payment, and the cost of the appraisal hereinafter directed, if previously made and returned, all as taxed by the clerk, be paid to the plaintiff, in which case the sale shall not take place, that the committee shall advertise such sale in the Bridgpeort Post on March 12, 19 and 26, 1983 and by erecting a sign on the premises on or before March 2, 1983; that the committee may obtain liability insurance protection for the premises; that the purchaser, unless it be the plaintiff, shall deposit with the committee at the time of the sale $18,000 cash or certified check or bank check, the balance to be paid within 30 days after the approval of the sale upon tender of the deed, (and that the deposit be forfeited if the purcahser shall default in completing the transaction); that when such sale shall have been made by Alfred Santaniello, the committee shall execute and submit for the approval of this court a conveyance of the premises to the purchaser, and make a return of his doings and bring the proceeds of the sale into court; that Steven A. Stollman, of Fairfield, Daniel V. Vilardi, of Westport and Cindy Exner of Norwalk, disinterested persons, are appopinted to appraise the property under oath and make return of their appraisal to the clerk of this court on or before March 24, 1983, and that the plaintiff shall be allowed his costs, including the expenses of the sale and appraisal, to be taxed and paid out of the proceeds of the sale and if the plaintiff is the purchaser at the sale, he shall pay to the committee only the

expenses of the sale or so much of the proceeds as exceeds his judgment, interest, attorney's fee and cost; whichever is the greater.

BY THE COURT

_____

Assistant Clerk

APPENDIX G

Exhibit I

NO. CV 81-0194304S	
CONNECTICUT SAVINGS BANK	: SUPERIOR COURT
VS.	: J.D. OF FAIRFIELD AT BRIDGEPORT
ROBERT A. HEGHMANN, ET AL	: MAY 6, 1982

AFFIDAVIT

The subscriber, being duly sworn upon his oath, deposes and says:

1. That he is an Officer of Connecticut Savings Bank, the plaintiff in the above entitled action, and that said Bank is now the actual and bona fide holder and owner of the note and mortgage described in paragraphs #1 and #2 of the complaint in said action, and annexed hereto.

2. That said note is now due and there remains unpaid thereunder the sum of $62,239.56.

3. That the defendants executed a mortgage note and deed on October 29, 1976, copies of which are hereto annexed.

4. That the defendants stopped making payments in November, 1980 and failed to make the monthly principal and interest and tax escrow payments for December, 1980.

5. The defendants were given an opportunity to bring their delinquent mortgage account current from February 23, 1981 until May 13, 1981 when counsel was instructed to institute this action because the defendants had been unable to reinstate the mortgage.

6. Although plaintiff did accept one payment during the period from February to May, 1981 when this matter was in the hands of the attorney for collection and reinstatement, the defendants delinquency continued to increase and no payment schedule could be established that the defendants complied with and they did not reinstate the mortgage loan at anytime prior to the institution of this action with collectible funds or cash.

CONNECTICUT SAVINGS BANK
By/s/Donald P. DeLude
Donald P. DeLude
Assistant Vice President

Subscribed and sworn to before me this 6th day of May, 1982.

/s/Susan A. Kelly
Notary Public

APPENDIX H

Exhibit II

Doc. No. CV 8101943048

Connecticut Savings Bank	: Superior Court
vs.	: Judicial District of Fairfield at Bridgeport
R.A. Heghmann, et. al.	: May 27, 1982

Affidavit in Opposition to Motion for Summary Judgment

I, Robert A. Heghmann, after being duly sworn do hereby depose and say:

1. I am over eighteen (18) years of age, am familiar with the facts set forth below, and believe in the obligation of the oath.

2. The Plaintiff's Motion for Summary Judgment (Interlocutory) is based upon two claims set forth in the Motion itself both of which are inaccurate and can be so demonstrated by a review of the file before the court. The first claim appears to be that the facts stated in the Complaint in this action are admitted in the Answer. The operative paragraph in the Complaint is paragraph 3. The allegations contained in paragraph 3 are denied by the defendants in their Answer dated September 24, 1981. That denial has not been mitigated in any way by any other pleading submitted by the Defendants in this action and I hereby deny it again for the purpose of this motion. The second claim supporting the motion is that the special defenses (and presumably the counterclaims) are insufficient *as a matter of law*. In this regard the Plaintiff is requesting this court to reconsider its decision on the Plaintiff's Motion to Strike dated October 6, 1981 which was denied in all respects by the court in a Memorandum of Decision by Judge Jacobson dated March 4, 1982 which upheld the interposition of the Special Defense *as a matter*

of law. The instant motion adds nothing either in fact or law to the prior motion and the decision therein. This motion should be denied.

3. The Affidavit submitted in support of the motion is also inaccurate. The Defendants have denied, continue to deny and I herein repeat the denial that the Defendants failed to make monthly payment due of Decmeber 1, 1980 and all subsequent payments and I personally tendered performance at the place specified in the note and in the manner contemplated by the parties to the agreement. The rejection of that tender of performance in what the Defendants now claim was an arbitrary, unwarranted and capricious manner forms the basis of the Special Defenses and Counterclaims which Judge Jacobson upheld as a matter of law. For this reason also this motion should be denied.

_____

Robert A. Heghmann

Subscribed and sworn to before me this 27th day of May, 1982.

_____

Commissioner of the Superior Court

I certify that copies have been mailed to all counsel of record in accordance with the practice book.

APPENDIX I

Exhibit III

THE COURT: All right. Did you want to answer that, Mr. Heghmann?

MR. HEGHMANN: No, your Honor. The papers speak for themselves.

MR. CRAMER: Oh! I remember! Pardon me. I remember what it was. May it please the court, very specifically, at the time that the Motion for Summary Judgment was heard Interlocutory, there were no counter-affidavits or responsive pleadings in the file. The court checked the file and there were no pleadings that had been served in accordance with the Practice Book, either on opposing counsel or with the court. The fact of the matter is that opposing affidavits, pursuant to the Practice Book, are supposed to be submitted no later than the day before the matter is scheduled to be heard. Although I believe his memorandum in opposition, or what have you, is in fact dated the day before they were not received by the court at the time the matter was heard. They were not part of the file. Although I do not have a filed date, I do know the court was not able to find them and they were not received in our office until the following Tuesday morning.

MR. HEGHMANN: Your Honor, I cannot account for the mails and I cannot account for why the Clerk was unable to file a document that was filed in his office the day before the Motion was on, which is dated.